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**FILED**

**FEB 09 2010**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

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**BEFORE THE BOARD OF OIL, GAS AND MINING  
DEPARTMENT OF NATURAL RESOURCES  
STATE OF UTAH**

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SOUTHERN UTAH WILDERNESS  
ALLIANCE, UTAH CHAPTER OF THE  
SIERRA CLUB,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

EARTH ENERGY RESOURCES, INC.

Intervenors,

DIVISION'S RESPONSE

TO

REQUEST FOR AGENCY ACTION

Docket No. 201009-009  
Cause No. M/047/0090

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The Division of Oil, Gas and Mining hereby submits its Response to the Petitioners' Request for Agency Action.

**JURISDICTION AND LEGAL AUTHORITY**

The Board has authority to review decisions of the Division at its informal hearings, and to review the Division's decision regarding applications to conduct mineral mining operations (Notices of Intention) pursuant to the provisions of Utah Code § 40-8-6 (2010) and Utah Admin. Code R647-5-106(17) (2010).

The Petitioners incorrectly allege that the Board has authority and jurisdiction over this appeal based on Utah Code § 40-10-14(3) (Utah Coal Act).

## **STANDING**

Petitioners have not set forth facts sufficient to support a claim of standing to appeal the Division's decision in this matter. Specifically the Petitioners have failed to allege with specificity that any of their members have an interest in the lands or other resources that actually may be mined or adversely affected by the approval of this NOI.

Almost 6000 acres of land surround the proposed mine site that are owned by SITLA and leased to the Operator. There is no allegation that the Petitioners have any public right of access or right to use of these lands. The potential for impact to the environment beyond this leased area is not clear, and has not been alleged with any particularity. The RAA alleges the Petitioners' members use the Tavaputs Plateau but does not allege how the approval of this 200-acre mine within the 6000-acre lease will diminish or adversely impact that use in any real way that the Board could prevent or remedy. To the extent that the Petitioners generally object to tar sands development, such a general objection does not provide standing to bring this action. They must allege a harm to an interest of their members that is within the power of the Board to remedy through this suit. Absent some demonstrable injury that may result from the approval that is within the jurisdiction of the Board, there is no standing.

## **SUMMARY OF RESPONSE**

The Petitioners allege as the general basis for this Request for Agency Action (RAA), that the Division has improperly authorized commencement of mining within the North Pit without requiring Energy Resources to provide details for the anticipated West Pit expansion. The sole issue presented by Petitioners in the RAA is that the NOI is deficient because it was approved without review of a specific mining plan for the West Pit. The Division acknowledges that the mining plan for the West Pit is not provided in any detail. However, the NOI as approved does not authorize mining at the West Pit prior to submitting additional information. It

is anticipated that the experience gained from operation of the first pit may modify the design of the second pit. The Division did consider the potential for expansion in calculating the amount of bond to be provided, but specifically advised the operator that the mine plan for the West Pit will need more details and will need to be approved prior to the expansion and commencing mining operations there<sup>1</sup>. Approval of an NOI based on an initial mine plan with anticipation of future expansion is routine and is not a violation of any provisions of the Utah Mined Land Reclamation Act (Utah Code §§ 40-8-1 through 23 (2010)), nor the rules governing large mineral mining operations, Utah Admin. Code R647-4-101 to 122 (2010).

This argument is a new and different objection to this NOI than those alleged by these Petitioners previously.<sup>2</sup> Petitioners allege that they do not waive “any other arguments it may raise before the Board after a complete review of the certified administrative record.” However, the Petitioners have had an abundance of opportunities to make a complete review of the administrative record: they were given notice of the tentative approval and filed objections which were responded to by the Division; they filed objections to the final decision and were provided an informal hearing at which their objections were responded to by the Division. At no time have the Petitioners not had access to the complete administrative record. There is no requirement or reason to ‘certify’ the administrative record.

The Petitioners are required to state in their Petition before the Board, the factual and legal basis for their claims of error, and the basis of their request for relief (Utah Admin. Code R641-104-133 and R647-5-106(17)). This RAA does not set forth the arguments that were raised

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<sup>1</sup> The permit does not authorize mining in the West Pit without Earth Energy submitting a more detailed plan in an amendment to the NOI (see Exhibit E).

<sup>2</sup> At the informal conference the Petitioners argued for the first time that the Division’s requirements for a permit to conduct mineral mining at Utah Code §§ 40-8-1 to 23 (2010) and in Utah Admin. Code R647-4-101 to 122 are inappropriate and inadequate for granting a permit to mine tar sands, and that the Division should apply the rules applicable to coal mining. The written request for an informal hearing alleged that there were six specific deficiencies in the NOI application. All of these alleged deficiencies were addressed by the Division at the informal hearing and the Director’s decision specifically found that they did not warrant denying the permit or revising the Division’s decision to approve the NOI.

and answered in the earlier objections and informal hearing. Petitioners' claims are limited to the claims set forth in their RAA. Accordingly, this Response will only address the issue raised in the RAA. The Division objects to any attempt by Petitioners to argue or introduce testimony or evidence in support of objections to this NOI that have not been pled in the Petition.

### **PROCEDURAL HISTORY**

The Division does not disagree with the presentation of the procedural history as set out in the Request for Agency Action. The NOI was initially submitted to the Division by Earth Energy on September 28, 2007. Prior to submitting the request the operator had been conducting limited operations at this location pursuant to a small mine NOI.<sup>3</sup>

The NOI for the large mine operation was reviewed, revised, resubmitted and on May 20, 2009, determined complete and tentatively approved by the Division. Public notice was given in order to receive public comment on the tentative decision as required by Utah Admin. Code R647-4-116. In response, comments were received from Western Resource Advocates (WRA) on July 2, 2009. The Division notified WRA that since the NOI was already conditioned upon obtaining the necessary permits from the Utah Department of Environmental Quality (DEQ) (from Divisions of Air and Water Quality) and/or the U. S. Environmental Protection Agency, that the Division determined not to hold a hearing.<sup>4</sup> WRA was also advised that an opportunity to make this and other objections to the final decision on the NOI would be afforded WRA after the final decision was made. (See letter of July 7, 2009, Exhibit A) The Division issued its final approval of the NOI on September 21, 2009, (Attached Exhibit B) and received a request for an informal administrative review on October 13, 2009. (Attached Exhibit C). An informal hearing

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<sup>3</sup> The small mine operations were primarily for the purpose of evaluating the proposed mining and recovery methods for these tar sands.

<sup>4</sup> Rule R645-8-116(2) provides that any person or agency may file written protest during the comment period, and Rule R645-8-116(4) provides that "if written objections of substance are received" by the Division during the response period a hearing shall be held. The Division advised WRA that it did not consider the written comments to be "objections of substance" since the permit was already subject to obtaining the DEQ permits. WRA did not contest nor appeal the Division's determination that a hearing was not required.

was held before the Division Director, John Baza, on November 23, 2009, and on December 22, the Director issued his decision upholding the Division's approval of the NOI. (Attached Exhibit D). At the request of WRA the Division issued a letter to clarify that the decision approving the NOI was conditional upon Earth Energy obtaining necessary air and water quality permits, and that the permit did not authorize mining in the West Pit without submitting a more detailed plan in an amendment to the NOI (Exhibit E). This appeal of that decision was timely filed.

### STATEMENT OF FACTS

The Division does not contest the Petitioner's Statement of Facts. The mine is located within a larger study area consisting of about 2,255 acres that is part of the lease of 5,930 acres from the School and Institutional Trust Lands Administration (SITLA).<sup>5</sup> The initial mine development as proposed and detailed in the NOI will be at the 62-acre North Pit. Earth Energy does anticipate development of the West Pit after the North Pit is mined. The details of the West Pit development are conceptual in nature at this time. The mining at the North Pit will remove 7.9 million cubic yards of material in order to recover the tar sands. Applying a bulkage factor of 1.3, mining at the North Pit will generate 9.7 million cubic yards of overburden, inter-burden and waste that will be placed in the pit in accordance with the mine plans. The Pit will then be re-contoured, covered with previously saved topsoil and revegetated.

In addition, the Division alleges as follows:

1. The mining is expected to remove about 1.9 to 2.6 million tons of material per year at the north pit and mining is expected to continue at the North Pit for about five years before Earth Energy will need to commence mining operations at the West Pit. (NOI at page 14-15)
2. Before allowing mining in the West Pit, the Division will require amendments to the NOI to provide more details concerning the design of the pit, the location and design of the

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<sup>5</sup> The mine is located on the border of Grand and Uintah County, and although the lease is state school trust lands the lease is adjacent to federal and tribal lands

overburden storage areas, and drainage and storm water discharge control plans and other aspects of the mine plan. (Exhibit E)

## ARGUMENT

The Petitioners arguments on appeal are that the approval of the mine plan for the North Pit and a conceptual design of the West Pit is wrong because it will: (1) allow mining operations to be increased based on review of an amendment rather than upon review of a significant revision of the NOI; (2) allow mining to proceed based on air and water permits that will only consider a portion of the total amount of anticipated operations; and (3) will not require a properly determined amount of bonding.

Each of these arguments is incorrect. (1) No mining can occur at the West Pit without further approval, and whether the additional review is for an amendment or for a significant revision cannot be determined until an application is made. The mine plan is preliminary and may change, the West Pit may be expanded or contracted in size, new mining methods may be adopted, there may never be an application for mining the West Pit, or the rules governing how a permit revision is reviewed may change. (2) The air and water permits will consider all of the authorized emissions; there is no preference or vested right to expand emissions or to obtain approval for a West Pit as a result of the NOI approval. The only emissions that can occur under the current permits are those related to the approved North Pit operations. (3) The amount of bonding required may be larger than necessary, but posting the excessive amount of bonding does not create a right to expand or require a lesser level of review.

Utah Code § 40-8-18(1)(a) (2010) provides “An operator conducting mining operations under an approved notice of intention shall submit to the division a notice of intention when revising mining operations.” Utah Code § 40-8-18(2)(a) 2010) provides that “the notice of

intention to revise mining operations will be designated as an amendment to the existing notice of intention by the division, based on rules promulgated by the board.” Utah Admin. Code R647-4-119 Amendments. states “1. An amendment is an insignificant change to the approved notice of intention. The Division will review the change and make the determination on a case-by-case basis”.

If the revision is not an amendment; i.e. is not an insignificant change, then Utah Admin. Code R647-4-118 provides:

1. In order to revise a notice of intention, an operator shall file a Notice of Intention to Revise Large Mining Operations. This notice of intention will include all information concerning the revision that would have been required in the original notice of intention.

2. A Notice of Intention to Revise Large Mining Operations, . . . will be processed and considered for approval by the Division in the same manner as an original notice of intention. The operator will be authorized and bound by the requirement of the existing approved notice until the revision is acted upon and any revised surety requirements are satisfied. Those portions of the approved notice of intention not subject to revision will not be subject to review under this provision.”

As was expressly reiterated to Petitioners after the informal conference, it is a condition of this NOI that mining on the West Pit will not be allowed without a revision. So the operator is required to and will file a revised NOI prior to mining the West Pit. Whether the revised NOI is reviewed as an amendment or a new permit will be based on the facts at the time.<sup>6</sup>

It is unlikely that adding a 37-acre pit would be considered “an insignificant change” to the approved NOI. If it is not considered an insignificant change, it will be reviewed exactly like a new permit. The Division’s determination that it ‘is’ or ‘is not’ an amendment will be subject to Board review at that time. It is premature to raise this as an issue now, since the rules make

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<sup>6</sup> Statements allegedly made ‘off the cuff’ by a staff person at the informal conference do not determine the test. Even if there were an informal 50% size guideline, the language of the rules control and supercede any informal policy or statement. Most importantly the test is to be applied to the revised NOI when it is filed based on the facts that exist then not based on a conjecture as to NOI that may be filed.

clear that the decision will be made when an application is received based on the facts at the time.

Until a revised NOI is approved, the operator is bound by the existing NOI and can continue to mine only pursuant to the approved NOI. There is no advantage to having an approved NOI if a revision is required. The review will be based on the same rules as a new permit. There is no vested right or preference based on having an approved NOI.

### **OTHER ISSUES**

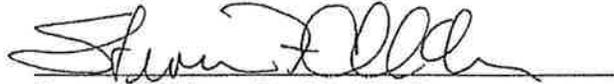
Other issues raised at the Informal Hearing and in the other requests for review should not be considered since they were not plead as part of this RAA. Nevertheless, there is no basis in law or fact for any of those claims. There is no legal basis for the Division to apply the coal rules to this mineral mine. There is no legal basis for the Division to require approval of all air quality and water quality permits prior to approval of the NOI. The NOI contains a storm water protection plan that is fully adequate to protect against storm water run-off. The NOI contains a thorough review of the potential for contamination from the chemical treatment of the ore and demonstrates that there is no risk of contamination. The mine plan and operations as described in the NOI are adequately designed to prevent damage from inadequate pit compaction, and provide for adequate reclamation and revegetation. The Petitioners have failed to plead any facts or law upon which the Board could find that the Division's approval was in error in any respect.

### **CONCLUSION**

The Petitioners have the burden to allege and to present facts in support of the challenge to the Division's decision. The only alleged deficiency is that the West Pit was improperly reviewed and included in the NOI. The approval of the NOI with a plan for future expansion subject to further review and approval, is not only legal but is prudent. The Petitioners' claim is

without merit and having presented no other facts to support claims of error, the Petitioner's Request to vacate the approval of the NOI should be denied.

Respectfully submitted this <sup>9<sup>th</sup></sup> day of February, 2010



Steven F. Alder, (Bar No #0033)  
Assistant Attorney General  
Counsel for Division of Oil, Gas and Mining

## CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Division's Response to Request for Agency Action, to be mailed by first class mail, postage prepaid or sent by email to the following, this 9<sup>th</sup> day of February, 2010 to:

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Joro Walker  
Rob Dubuc  
ATTORNEYS FOR  
SOUTHERN UTAH WILDERNESS ALLIANCE  
425 East 100 South  
Salt Lake City, UT 84111

A. John Davis  
Holme Roberts & Owen LLP  
299 South Main St. 1800  
Salt Lake City, Utah 84111

Mike Johnson  
Counsel Board of Oil Gas and Mining  
email.

  
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# **EXHIBIT A**



JON M. HUNTSMAN, JR.  
Governor

CARY R. HERBERT  
Lieutenant Governor

## State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA  
Division Director

M/047/0090

0007

July 7, 2009

Rob Dubuc, Esq.  
Western Resource Advocates  
150 S. 600 E., Suite 2A  
Salt Lake City, Utah 84102

Subject: Public Comments Regarding Tentative Approval to Commence Large Mining Operations, Earth Energy Resources, PR Springs Mine, M/047/0090, Uintah County, Utah

Dear Mr. Dubuc:

The Division received Western Resource Advocates' comments regarding the tentative decision on the application for the proposed PR Springs Mine on July 6, 2009. We received the comments through the State Resource Development Coordinating Committee (RDCC) in response to the public notice provided pursuant to R647-4-116, Utah Administrative Code (2009).

The Division will take into consideration all comments received in the final decision on the application. One of the items you mentioned was a copy of the air quality information referred to on Page 50 of the Notice of Intent to Commence Large Mining Operations. This information had already been requested in our tentative approval, dated May 20, 2009.

Under the provisions of R647-4-116 Utah Administrative Act, a person aggrieved by the tentative decision may file a written protest and if the Division finds that written objections of substance have been received a hearing may be held before the Division. Because you did not file a protest, nor specifically request a hearing at this time, the Division has determined that it will not hold a hearing as part of the public comment process. If you object to this determination you must file objections within ten (10) days with the Division requesting a review of this decision pursuant to R647-5-104(2) and (2.13) Utah Administrative code.

Regardless of the decision to hold an hearing under R647-4-116, you will have the right to protest the final permit decision and issuance by filing a Request for Agency Action for an informal adjudicative proceeding before the Division pursuant to R647-5-104(2) and (2.13) within the time provided for by the notice of decision.



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Page 2  
Rob Dubuc  
M/0470090  
July 7, 2009

An informal hearing of the decision will then be held and conducted in accordance with the rules at R647-5-106 Utah Administrative Code.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dana Dean', with a long horizontal flourish extending to the right.

Dana Dean, P.E.  
Associate Director, Mining

DD:vs

cc: Barclay Cuthbert, Earth Energy  
John Baza, DOGM  
Steve Alder, Asst. Attorney General  
Paul Baker, DOGM

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# **EXHIBIT B**



JON M. HUNTSMAN, JR.  
Governor

GARY R. HERBERT  
Lieutenant Governor

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

### Division of Oil, Gas and Mining

JOHN R. BAZA  
Division Director

1009

September 21, 2009

Barclay Cuthbert  
Earth Energy Resources  
404-6<sup>th</sup> Avenue Southwest  
Calgary, Alberta Canada T2P 0R9

Subject: Conditional Approval of Notice of Intention to Commence Large Mining Operations (NOI), Earth Energy Resources, PR Springs Mine, M/047/0090, Uintah County, Utah

Dear Mr. Cuthbert:

The Division approves the Notice of Intention to Commence Large Mining Operations (NOI) for the PR Springs mine conditional on receipt of a reclamation surety. The surety amount is \$1,679,200.00 which may be submitted in the form of a letter of credit, a surety bond, cash, or a certificate of deposit. Please contact the Division's bond coordinator, Penny Berry, at 801-538-5291 or by e mail at [bondcoordinator@utah.gov](mailto:bondcoordinator@utah.gov) for further information about submitting the surety

You will also need to submit a reclamation contract (enclosed). Please fill out the fact sheet and have the contract signed by a person who is legally authorized to bind the company

Also enclosed with this letter is a copy of the NOI stamped approved.

Please ensure you have authorization from the Bureau of Land Management and the School and Institutional Trust Lands Administration and any other appropriate agency, such as Uintah and Grand Counties. Approval from the Division does not relieve you from obligations to comply with the requirements of other agencies.

Thank you for your cooperation during the permitting process.

Sincerely,

Dana Dean, P. E.  
Associate Director of Mining

DD:phb:ldh:plb

Enclosure: Reclamation Contract

Stamped NOI

cc: Vernal Field Office BLM

[pnic\\_abeysa@blm.gov](mailto:pnic_abeysa@blm.gov)

[wstokes@utah.gov](mailto:wstokes@utah.gov)

Uintah County

Charles Dubuc, Western Resource Advocates, 150 South 600 East, Suite 2AB, Salt Lake City, Utah 84102

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OIL, GAS & MINING

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# **EXHIBIT C**



**WESTERN RESOURCE  
ADVOCATES**

M/047/0090  
cc: Leslie  
0010

September 9, 2009

Dana Dean  
Associate Director of Mining  
Division of Oil, Gas & Mining (DOG M)  
1594 West North Temple, Suite 1210  
Salt Lake City, Utah 84116

**RECEIVED**

OCT 13 2009

Re: Conditional Approval PR Springs Mine M/047/0090  
DOG M File Number or other Reference Number:

ATTORNEY GENERAL  
Natural Resources Division

Ms. Dean:

This is to notify you that we are filing a Request for Agency Action pursuant to Utah Code Ann. § 63G-4-201, Utah Admin. Code r 647-5-104(1.12) and (2.13), and r 647-5-106, on behalf of both the Southern Utah Wilderness Alliance (SUWA) and the Utah Chapter of the Sierra Club challenging the Division's decision to approve the Notice of Intention to Commence Large Mining Operations for the PR Springs mine. We request an informal hearing before the Division Director on the issues below.

The following paragraphs represent the statements of relief sought from the Division along with the statements of facts and reasons forming the basis for the relief sought:

**I. Air Quality Data and Analysis are Unavailable**

**Relief Sought**

In its May 20, 2009 letter to Earth Energy, DOGM notes that the company is required to include air quality information, including the EPA air quality permit, in Appendix B. Appendix B currently contains no such information. DOGM must allow the public to review and comment on EPA's permit and conditions, as well as on the means by which Earth Energy intends to attempt to comply with those conditions. Until such time as it has provided this data and allowed sufficient time for the public to comment on this information, it would be inappropriate for the Division to give final approval to proceed with this permit.

**Statement of Facts and Reasons Forming the Basis for Relief**

Initially, it is inappropriate for DOGM to approve or otherwise allow construction or operation of mining operations to commence until the public has been given a meaningful opportunity to review and comment on the required air quality data, analysis and permitting associated with this project. As put forth in Earth Energy's Notice of Intention to Commence Large Mining Operations (NOI), the Environmental Protection Agency (EPA) has taken the lead on air permitting for this operation given its Tribal Land location (NOI at 50). As of the date of

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COLORADO • 2260 Baseline Road, Suite 200 • Boulder, CO 80302 • 303.444.1188 • Fax: 303.786.8054 • Email: info@westernresources.org

www.westernresourceadvocates.org

0010

availability of the file in the Division's Public Information Center, evidence of EPA's permit was not present. While Earth Energy notes that it "intends to comply with the conditions set forth by EPA," such a broad statement is insufficient.

In his April 21, 2008 letter to the Bureau of Land Management, the Director of Utah's Public Lands Policy Coordination office, John Harja, noted that the State is concerned over the regional cumulative impacts to air quality of tar sands projects. Letter from John Harja to the Bureau of Land Management (Apr. 21, 2008) at 2. He further noted that the National Ambient Air Quality Standard (NAAQS) for PM<sub>2.5</sub> and Ozone are of concern to the State, especially in high elevation valleys such as the PR Springs area. *Id.* Given the increased importance of the impacts of energy development in the area of PR Springs, it is imperative that DOGM not give short shrift to the potential air quality impacts of this project.

## **II. Soil Erosion and Stormwater Runoff**

### **Relief Sought**

At a minimum, DOGM is required to ensure that the company has coordinated with the Division of Water Quality and has obtained a stormwater permit. To date, there is no evidence that such a permit has been issued. Further, DOGM must ensure that proper monitoring occurs related to the potential sediment load of runoff from the overburden/interburden storage piles, especially during a heavy precipitation event. As noted in the project's SWPPP, the overburden storage areas are outside of the pit and plant site containment areas, and sediments may be released onto undisturbed lands or waters of the State. SWPPP at 7.

### **Statement of Facts and Reasons Forming the Basis for Relief**

This project promises to result in significant soil erosion and stormwater runoff. Yet, there is no Stormwater Discharge Permit in the file or referenced in the NOI. As a result, the public cannot comment in any way on possible provisions to protect surface waters. Moreover, because stormwater runoff will impact a stream designated as impaired, any Stormwater Discharge Permit must contain conditions sufficient to ensure that the discharge will not cause or contribute to a violation of state water quality standards or to ensure the impair water will come into compliance with these standards. 40 C.F.R. §§ 122.4(i); 122.44(d); 123.25. Therefore, because there is no permit and because there is no permit with terms and conditions sufficient to enable the water to return to meeting water quality standards, the project cannot proceed.

A number of activities associated with this mine will increased soil erosion due to ground disturbance. This erosion may subsequently have a significant impact on surface water quality in the affected area. With this type of mining activity, degradation of surface water quality is often caused by increased sediment load from waste piles, which are clearly present in this project. For instance, spent tar sands within waste piles could be sources of contamination for salts, metals and hydrocarbons for surface water.

Additionally, surface disturbance that may alter natural drainages can occur by both diverting and concentrating natural runoff, especially during construction and reclamation stages. These surface disturbances could become a non-point source of sediment to surface water bodies. Examples of sources of potential increased sediment flow during the construction operations are activities such as clearing of vegetation and stripping of overburden; stockpiling of topsoil and overburden; drilling and blasting; backfilling, grading and contouring; on and off road traffic; disposal of tailings, developing facilities; drainage construction; and land reclamation of access roads, spent tar sands and overburden/interburden storage areas and facility sites.

Further degradation of surface water quality could result from this project due to activities that contribute to soil erosion, such as removal and stockpiling of overburden material and topsoil. There is also no indication within the NOI or the Stormwater Pollution Prevention Plan (SWPPP) that erosion rates along rights-of-way or roads were considered. Drainage along roads may contribute to soil erosion as the surface runoff is channeled into these drainages.

The NOI notes that the project will result in 4.9 million cubic yards of excess material in the overburden/interburden storage areas, and that these storage areas fall outside of containment measures on the side slopes of Main Canyon. NOI at 14, 20. Thus, the disturbances for this project will affect the Main Canyon watershed. NOI at 35. Main Canyon generally flows west and northwest, entering Willow Creek west of the project area, and Willow Creek then flows into the Green River near Ouray. *Id.* Thus, the headwater drainages that will be filled by, and are prone to runoff from, the overburden/interburden storage areas flow ephemerally into Main Canyon. NOI at 35-36, SWPPP at 15. The importance of this potential source of sediment load is that Main Canyon is a tributary of Willow Creek which is listed as an impaired stream on Utah's 303(d) list for total dissolved solids. Earth Energy Groundwater Discharge Permit at 4.

The NOI states that runoff from the overburden/interburden storage areas will be controlled by facing the steepest portions of the slopes with coarse overburden material, placing armoring within the channel formed by the contact between the pile and the native slope, and by installing an energy dissipater at the toe of the pile. *Id.* at 37. The company claims that due to the size of the storage area materials, the waste piles will not produce significant amounts of sediment. *Id.*

However, the NOI also notes that the overburden/interburden storage areas inherently have a higher potential risk of slope stability issues. NOI at 46. While the NOI states that these areas will be designed to be stable during normal conditions, and that the use of flatter-than-needed grades should eliminate the risk of runoff, the company offers no proof of these assertions. NOI at 20-21. Regardless of this claim, the overburden/interburden storage area No. 1 will be constructed at a 40 percent slope and will be susceptible to considerable runoff danger. *Id.* Even assuming the truth of this assertion, the flattened grades will not be in place until the reclamation phase of the project. During the operational phase, the NOI states that the average slope will be 1.5:1, or 66 percent, much steeper than the proposed final grade of the piles. (NOI at 47). Such steep grades will be especially prone to erosion during high precipitation events.

Because the overburden piles have no secondary containment measures, this condition poses a high risk of adding to the sediment load of Willow Creek

Further, during reclamation, the replacement of stockpiled topsoil and the establishment of stabilizing vegetation will require a substantial amount of time and these areas may be a source of erodible material depending on the slope and weather conditions. Because of this, the company must be required to install secondary containment measures until reclamation is complete. Such measures could include requiring the planting of mature vegetation on the edges of ephemeral washes to help prevent the transport of disturbed soil into Main Canyon.

While the company makes the assertion that only minor amounts of runoff will be generated on the outside faces of the storage areas, it offers no basis for this assertion. NOI at 48. It offers as proof the alleged success of the use of their proposed overburden/interburden storage areas design in their 2005 product test pit. However, the success of this design has not been verified by monitoring data or independent sources and, further, the company offers no proof that the potential success of such a design on a small 5-acre test site will transfer without failure to a 213-acre industrial site housing 70 acres of overburden/interburden.

### **III. Process Chemical**

#### **Relief Sought**

Given the potential expansion of the use of the process chemical should this project prove successful, further, independent analysis of this substance must be performed in order to ensure the public of the statement by Earth Energy that this chemical will not harm the environment<sup>1</sup>

#### **Statement of Facts and Reasons Forming the Basis for Relief**

Regarding the "process chemical" used in the refinement process, SWPPP at 9, although we respect the requirement to protect proprietary processes and information, DOGM is asking the public to accept at face value the assertion that the process chemical used by Earth Energy is non-toxic and, while present in tailings, will be "clean (inert), 'damp-dry' sand," SWPPP at 1, that will have a de minimis effect on stormwater runoff. This assertion has been made in spite of the fact that the company admits that the chemical's biodegradability has not yet been determined. NOI at 17. DWQ's review of this chemical was strictly in the context of ground water contamination and does not adequately address possible contamination of surface water. *See letter from Rob Herbert March 4, 2008 to Earth Energy Resources (Mar. 4, 2008).*

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<sup>1</sup> The same analysis must be applied to the potential air quality impacts of this process and the use of this chemical. As with surface water impacts, there is no evidence in the file to support contentions that project will not result in air emissions.

#### **IV. Drainage Design**

##### **Relief Sought**

DOG M must require that the company uses 25 or 100 year standards in the design and construction of the facility drainage system.

##### **Statement of Facts and Reasons Forming the Basis for Relief**

Regarding the facility drainage design, the SWPPP notes that the ditches are designed for a 10-year, 6-hour precipitation event. SWPPP at 5. The use of a 10-year standard for the design of these ditches is insufficient. This area is prone to significant summer storms; and the potential consequences of a stormwater runoff into the Willow Creek drainage will likely further impair this water body.

#### **V. Reclamation Efforts**

##### **Relief Sought**

DOG M must require sufficient assurances from the mining company that reclamation efforts will be successful prior to allowing the project to go forward.

##### **Statement of Facts and Reasons Forming the Basis for Relief**

The NOI notes that the company intends to use fast growing cover grass will be used during the reclamation process. The NOI fails, however, to address issues such as the moisture needs to ensure germination of the seeds. Further, the NOI also fails to address potential erosion issues on sloped areas prior to seed germination. What measures will be taken to prevent erosion prior to establishment of the maturation of the stabilization vegetation? The NOI indicates that the company will not mulch the reseeded area, thus ensuring stability of sloped areas during the germination process.

#### **VI. Pit Compaction/Subsidence**

##### **Relief Sought**

DOG M must ensure that the company monitors for subsidence after the reclamation phase of the project and must require the company to bond for this contingency.

##### **Statement of Facts and Reasons Forming the Basis for Relief**

The NOI fails to address the issue of possible subsidence within the perimeter of the pit area subsequent to refilling the pit with used tailings. Because the company claims that it will backfill the pits to 60-65% of their original volume, but makes no assertion that it will take

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measure to ensure proper compaction of this material during the backfilling process, what measures are the company taking to prevent future subsidence of the pit area over time?

Additionally, please be aware that we have had continuous contact with Mike George at the Division of Water Quality (DWQ) and Mr. George has not yet made a determination whether or not a UPDES permit for the PR Springs Mine will be required. Mr. George indicated that he would need to make a site visit prior to making that determination and that he intended to make such a visit in mid-October. Because Mr. George has not yet made his decision, it would be inappropriate for DOGM to allow commencement of operations to begin until DWQ issues a final ruling on the UPDES permit process and we have had a chance to review, comment and possibly challenge that permit.

If you have any questions on this matter, please feel free to call me at 801.487.9911

Yours,



Rob Dubuc  
Attorney for SUWA  
and Sierra Club

**CERTIFICATE OF MAILING**

I hereby certify that on October 9, 2009, I served a true and correct copy of the foregoing **Request for Agency Action** on the following by first-class mail:

Steve Alder  
Assistant Utah Attorney General  
1596 West North Temple, # 300  
Salt Lake City, UT 84116

Barclay Cuthbert  
Earth Energy Resources  
404-6<sup>th</sup> Avenue Southwest  
Calgary, Alberta Canada T2P 0R9

Dated October 9, 2009.



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Rob Dubuc  
Western Resource Advocates  
Attorney for SUWA and Sierra Club

# **EXHIBIT D**



JON M. HUNTSMAN, JR.  
*Governor*

GARY R. HERBERT  
*Lieutenant Governor*

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
*Executive Director*

### Division of Oil, Gas and Mining

JOHN R. BAZA  
*Division Director*

December 22, 2009

Certified Return Receipt  
7005 2570 0000 4801 6607

Mr. Rob Dubuc  
Western Resource Advocates  
150 South 600 East, Suite 2AB  
Salt Lake City, Utah 84102

Mr. Barclay Cuthbert  
Earth Energy Resources  
6<sup>th</sup> Avenue SW Suite # 740 404  
Calgary, Alberta T2P 0R9

Subject: Informal Conference for PR Springs Mine M/047/0090

Gentlemen:

On November 23, 2009, the Division of Oil, Gas, and Mining ("the Division") held an informal conference regarding the Division's approval of the Notice of Intention to Commence Large Mining Operations ("NOI") for the referenced mine. Western Resource Advocates on behalf of itself and Utah Chapter of the Sierra Club, and Southern Utah Wilderness Alliance ("the Petitioners") requested the informal conference by letter dated September 9, 2009, addressed to Ms. Dana Dean, Associate Director of Mining for the Division. As the hearing officer for the November 23, 2009 informal conference, I am providing this letter to the parties in order to communicate my decision from the conference.

The informal conference proceeded as follows:

1. The conference commenced at approximately 1:15 p.m. Mr. John Baza, Director of the Division acted as hearing officer. Mr. Baza introduced the parties, described the type of conference being held, and presented the procedure for the conference.
2. Mr. Steven Alder, as attorney for the Division introduced the application and described the appeal. Mr. Paul Baker, Minerals Program Manager for the Division, provided an overview and history of the NOI on behalf of the Division.



3. Mr. Rob Dubuc and Ms. Joro Walker representing the Petitioners stated their concerns and objections to the Division's issuance of the mining permit.
4. Mr. John Davis of Holme, Roberts & Owen, LLP, counsel for the mining applicant Earth Energy Resources, responded. Ms. Karla Knoop and Ms. Linda Matthews of JBR Environmental Consultants appeared as witnesses for Earth Energy Resources and discussed storm water and air quality permitting through the Department of Environmental Quality.
5. Mr. Alder responded for the Division and Ms. Leslie Heppler and Mr. Tom Munson, Environmental Scientists for the Division, discussed storm water protection, drainage, mine plan requirements and other technical information related to subsidence and compaction and hydrological evaluation.
6. Mr. Dubuc provided rebuttal and closing statements.
7. Following concluding questions and remarks, Mr. Baza adjourned the informal conference at approximately 3:15 p.m.

Based on the information and arguments presented at the informal conference, I have concluded as follows:

1. There is no regulatory or statutory basis for the Petitioner's verbal argument that the Minerals Regulatory Program of the Division should be applying standards of review for the NOI based on the Coal Regulatory Program of the Division that derives authority from the U.S. Surface Mining Control and Reclamation Act ("SMCRA).
2. The Division has correctly reviewed the NOI to assure compliance with the Mined land Reclamation Act and regulations as required to proceed with mining operations. Specifically, the Division has correctly determined that the NOI:
  - a. Provides for adequate drainage control to prevent damage from drainage by preventing any discharge of waters from the site;
  - b. Includes a storm water protection plan that provides for monitoring, control, and actions to protect the surrounding area from storm runoff from water rock dumps during mining and reclamation;
  - c. Contains adequately designed site compaction to prevent settling that would adversely affect the post mining land use or successful reclamation;
  - d. Includes a plan for reclamation and re-vegetation that will return the site to the approximate contours and will re-vegetate the site; and
  - e. Is subject to the Earth Energy Resources full compliance with air and water permitting requirements for the operations prior to commencement of mining operations.
3. The NOI for the PR Springs Mine meets all other challenges or deficiencies as presented by Western Resource Advocates in their written and verbal comments.

Therefore, it is my decision to uphold the Division's approval of the NOI.

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Rob Dubuc  
M/0470090  
PR Spring  
December 22, 2009

Any party has the right to appeal this decision to the Board of Oil, Gas, and Mining as a formal adjudicative proceeding in accordance with Rule R647-5-106.17 and Rules R641-100 et seq., by filing an appeal with the Board Secretary, Ms. Julie Ann Carter within ten (10) days of receipt of this letter.

You are advised to contact Ms. Julie Ann Carter at the Division's address and telephone number if you have questions regarding the procedures for filing an appeal to this decision.

Sincerely,

A handwritten signature in black ink, appearing to read "John R. Baza". The signature is written in a cursive style with a large initial "J".

John R. Baza  
Director

JRB/vs

cc: John Davis  
Steve Alder  
Dana Dean  
Paul Baker

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# **EXHIBIT E**



JON M. HUNTSMAN, JR.  
Governor

GARY R. HERBERT  
Lieutenant Governor

## State of Utah

### DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

#### Division of Oil, Gas and Mining

JOHN R. BAZA  
Division Director

December 29, 2009

Rob Dubuc  
Western Resource Advocates  
150 South 600 East, Suite 2A  
Salt Lake City, Utah 84102

Subject: Clarification of Permitting Issues, Earth Energy Resources, PR Springs Mine, M/047/0090, Uintah County, Utah

Dear Mr. Dubuc:

The purpose of this letter is to provide clarification on certain issues related to approval of the PR Springs mine. The issues are whether the Division's approval is conditional on approval of air and water quality permits and whether the west pit is considered to be approved. The simple answer to both of these questions is "yes," but additional explanation is provided below.

#### Air and Water Quality

As stated in John Baza's December 22, 2009, letter, the Notice of Intention to Commence Large Mining Operations (NOI) is subject to the Earth Energy Resources full compliance with air and water permitting requirements for the operations prior to commencement of mining operations. It is not known at this time exactly what air and water quality permits will be required by the Division of Water Quality or the Environmental Protection Agency (EPA).

The plan has adequate information to comply with the impact analysis and mitigation plan requirements of rule R647-4-109, but the operator will need to comply with requirements of other agencies before mining may commence. Concerning air quality, the plan states on page 50 that "Earth Energy intends to comply with the conditions set forth by EPA; documentation is included in Appendix B." This appendix has a placeholder for air quality correspondence but contains no approvals or information indicating whether approvals will be required. The operator needs to supply this information.



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Rob Dubuc  
M/047/0090  
December 29, 2009

West Pit

The west pit is included in the disturbed area boundary and is thus bonded for disturbance; however, as the plan says on pages 14 and 15, the designs for this pit are conceptual at this time. Earth Energy commits in the plan to submit an amendment prior to mining this area, and the reclamation surety would be adjusted in accordance with the details of the revised plan.

I hope this answers your questions, but please feel free to contact me at 801-538-5261 or by e mail at [paulbaker@utah.gov](mailto:paulbaker@utah.gov) if you need additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'PBB', written in a cursive style.

Paul B. Baker  
Minerals Program Manager

PBB:vs

cc: Barclay Cuthbert, Earth Energy  
lmatthews@jbrenv.com  
Steve Alder

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